

May 21, 2018

**VIA ELECTRONIC MAIL**

Regional Freedom of Information Officer  
U.S. EPA, Region 10  
Office of Ecosystems, Tribal and Public Affairs  
1200 6<sup>th</sup> Avenue ETPA-124  
Seattle, WA 98101  
Email: r10.foia@epa.gov

**Re: Freedom of Information Act Request Regarding the Donlin Gold Project Draft  
Environmental Impact Statement and Final Environmental Impact Statement**

Dear FOIA Officer:

The Northern Alaska Environmental Center (Northern Center), submits this request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

**Documents Requested**

The U.S. Army Corps of Engineers (Corps) has published a draft environmental impact statement (DEIS) and a final environmental impact statement (FEIS) for the Donlin Gold Project (Donlin project). *See* U.S. Army Corps of Eng'rs, Donlin Gold Project: Draft Environmental Impact Statement (2015) (DEIS); U.S. Army Corps of Eng'rs, Donlin Gold Project: Final Environmental Impact Statement (2018) (FEIS). The DEIS and FEIS list the U.S. Environmental Protection Agency (EPA) as a cooperating agency. *See* DEIS at 6-1; FEIS at 6-1. Specifically, the FEIS cites EPA's statutory authority over soils, water, and air. *See* FEIS at 3.2-6 & 3.26-6.

**We request copies of all emails or other correspondence (including attachments) relating to the Donlin Gold Project DEIS and FEIS. We ask that the records be provided in electronic format if possible. We do not seek comments from members of the public submitted on the DEIS.**

**Fee Waiver Requested**

We request a waiver of any fees associated with this request. FOIA mandates that agencies waive or reduce fees for searching, copying, and reviewing documents where the disclosure is both (I) "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government," and (II) "not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l).

## **I. The Request Concerns the Operations of Government.**

EPA has issued regulations outlining four factors it considers in deciding whether a fee waiver is warranted: (1) the request concerns the operations or activities of the government; (2) the disclosure will likely contribute to public understanding of government operations or activities; (3) the disclosure will significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject; and (4) the public's understanding of the subject in question will be enhanced to a significant extent by the disclosure. *See* 40 C.F.R. § 2.107(l)(2). The information below demonstrates that the Northern Center meets the required criteria and is entitled to a full fee waiver.

### **1. The Request Concerns Government Operations and Activities.**

This FOIA request seeks information related to EPA's participation in the Donlin DEIS and FEIS. EPA maintains databases related to cleanup activities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and impaired waters designated under the Clean Water Act (CWA). It also maintains reporting requirements for greenhouse gas (GHG) emissions under the Clean Air Act (CAA). The Agency is listed as a cooperating agency involved in the NEPA process for the Donlin Project pursuant to each of these three statutory areas. *See* FEIS at 3.2-4 & 3.26-6. This FOIA request concerns communications related to these government operations and activities, and any other involvement EPA had with the Donlin DEIS or FEIS.

### **2. Disclosure Will Likely Meaningfully Contribute to Public Understanding of the Government's Operations and Activities.**

There is a direct connection between the requested records and EPA's participation in the NEPA process. These records will shed light on EPA's involvement as a cooperating agency. The records sought may reveal contributions to, and criticisms of, the DEIS and FEIS that EPA is uniquely qualified to make, as well as any feedback other agencies may have provided on EPA's involvement.

Information regarding EPA's communications with the Corps during development of the DEIS and FEIS is new, not already publicly available, and relevant to EPA's involvement as a cooperating agency. *See id.* § 2.107(l)(2)(ii). Thus, disclosure would provide insight into EPA's participation in analyses of impacts to the environment or other parts of the NEPA process.

EPA's records would advance the public's understanding of the NEPA process even though the Corps is the lead agency on the DEIS. "The application of FOIA . . . is not limited to those agencies with formal legal responsibility for [a decision], but applies to any agency that has relevant responsive documents." *Ctr. for Biological Diversity v. Office of Mgmt. & Budget*, 546 F. Supp. 2d 722, 730 (N.D. Cal. 2008). As a cooperating agency, with significant jurisdiction over

environmental regulations and permits critical to the project, EPA has special influence in the Corps' environmental review and eventual permitting decision. *Cf. id.* at 731 (noting that the responsive agency's input was "particularly meaningful" in a rulemaking and could have "ma[d]e a particular option more or less attractive").

Northern Center is a grassroots public-interest organization and disclosure will contribute to the public understanding of these operations and activities. *See* 40 C.F.R. § 2.107(l)(2)(ii)-(iii). Northern Center promotes conservation of the environment and sustainable resource stewardship in Interior and Arctic Alaska through education and advocacy. It will apply the information contained in the requested records to scrutinize the scientific and legal underpinnings of the DEIS and the FEIS, and the results will support its efforts to raise awareness about the project, as discussed further in the following section.

### **3. Disclosure Will Contribute to the Understanding of a Reasonably Broad Audience of Persons Interested in the Subject.**

Disclosure will significantly contribute to the understanding of "a reasonably broad audience of persons interested in" the Donlin mine and EPA's role in the NEPA process. 40 C.F.R. § 2.107(l)(2)(iii). The Northern Center intends to send alerts, fact sheets, and other literature about the project to its 1,500+ members related to the Donlin Project. *See* N. Alaska Env'tl. Ctr., *About Us*, <http://northern.org/about-us>. Equipped with the records sought, the Northern Center will be better able to inform its members and the public at large about aspects of a project that could affect their interests.

Northern Center's expertise, resources, and commitment to educating the public establish that disclosure is likely to contribute significantly to public understanding of these issues. *See* 40 C.F.R. § 2.107(l)(2)(ii) & (iv). *Cf. Friends of the Coast Fork v. U.S. Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997). It is qualified to extract, analyze, synthesize, and convey the requested information to its members, other organizations, and the public at large in a way that will increase understanding of government actions affecting environmental resources in Alaska. It has grassroots organizers who specialize in public outreach. It uses its expertise to analyze and evaluate information about governmental decisions affecting the environment and provide its analyses and evaluations to its members, other organizations, and the general public. It intends to do the same here in relation to the DEIS and FEIS. The Northern Center's ability and intent to do so demonstrate that disclosure will contribute to a broad public understanding of government activities. *See* 40 C.F.R. § 2.107(l)(2)(iii); *cf. W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040-41 (D. Idaho 2004) (observing that the requester "wanted to summarize the information into a more reader-friendly format and then distribute the information to the public" through its newsletter and website); *Inst. for Wildlife Prot.*, 290 F. Supp. 2d at 1231-32 (noting that the requester had "expertise in analyzing [the] type of information" sought and intended to summarize its analysis for the public via webpages, mailing lists, and other channels).

**4. The Public's Understanding of the Subject in Question Will Be Enhanced to a Significant Extent by the Disclosure.**

As a federal agency with significant authority over natural resources and public health, communication within EPA and other agencies and persons on the DEIS and FEIS will provide unique insight on important issues. The requested communications would therefore "enhance" the public's understanding the NEPA process to a significant extent. See 40 C.F.R. § 2.107(l)(2)(iv); cf. *Nat. Res. Def. Council, Inc. v. EPA*, 581 F. Supp. 2d 491, 501 (S.D.N.Y. 2008) ("The public's understanding of [an agency's] decisionmaking will be significantly enhanced by learning about the nature and scope of [the agency's] communication with commercial interests.").

**II. Disclosure Is Not Primarily in the Commercial Interest of the Requester.**

The Northern Center is a nonprofit organization that has no commercial interest in the requested records. See *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (noting that FOIA's fee waiver provision is to be "'liberally construed in favor of waivers for noncommercial requestors'" (quoting legislative history)); see also 40 C.F.R. § 2.107(l)(3) (stating that a requesting group's "identity, vocation, and intended use of the requested records are all factors to be considered in determining whether disclosure would be primarily in [its] commercial interest"). It is a grassroots environmental organization that intends to use the information sought to advocate for Alaska's wildlife, habitats, wilderness, water, and cultures. Cf. *Friends of Oceano Dunes, Inc.*, 2001 WL 6748575, at \*3 (concluding that an organization's request for information pertaining to its members' recreational opportunities was not primarily in the organization's commercial interest). Accordingly, EPA should grant the Northern Center's request for a fee waiver. See 5 U.S.C. § 552(a)(4)(A)(iii).

\* \* \*

Please contact me if you have any questions, or if I can clarify this request in any way. I can be reached at 907-452-5092. As provided by FOIA, 5 U.S.C. § 552(a)(6)(A), we look forward to a reply within twenty working days. Thank you in advance for your assistance.

Sincerely,

*Lachlan Gillispie*

Lachlan Gillispie

Northern Alaska Environmental Center